one
COMMUNICATIONS℠

Paula W. Foley
Director, Regulatory Affairs
24 Albion Road, Suite 230
Lincoln, RI 02865
401-834-3370 Tel.
401-834-3350 Fax
pfoley@onecommunications.com

Via Overnight Delivery

October 17, 2007

Mrs. Susan M. Hudson, Clerk
Public Service Board
112 State Street
Drawer 20
Montpelier, VT 05620-2701

Re: Joint Petition of Verizon New England Inc., d/b/a/ Verizon Vermont, Certain Affiliates Thereof, and FairPoint Communications, Inc. for Approval of an Asset Transfer, Acquisition of Control by Merger and Associated Transactions, Docket No. 7270

Dear Mrs. Hudson:

Enclosed for filing are the original and six (6) copies of One Communications' Initial Brief in opposition to the petition of Verizon New England Inc., d/b/a Verizon Vermont et al. ("Verizon") and FairPoint Communications, Inc. ("FairPoint") for approval of the proposed transfer of control in the above-captioned proceeding.

Please contact me if you have any questions. Thank you.

Very truly yours,

Paula W. Foley

Paula W. Foley

PWF/nj
Enclosures

Cc: Service List (Electronic and First Class Mail)

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7270

Joint Petition of Verizon New England, Inc.	)
d/b/a Verizon Vermont, Certain Affiliates	)
Thereof, and FairPoint Communications, Inc.	)
for approval of an asset transfer, acquisition of	)
control by merger and associated transactions	)

INITIAL BRIEF OF ONE COMMUNICATIONS CORP.

Paula W. Foley
ONE COMMUNICATIONS CORP.
24 Albion Road, Suite 230
Lincoln, Rhode Island 02865
(401) 834-3370

Of Counsel:
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, DC 20006
(202) 303-1000

October 17, 2007

TABLE OF CONTENTS

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7270

Joint Petition of Verizon New England, Inc.	)
d/b/a Verizon Vermont, Certain Affiliates	)
Thereof, and FairPoint Communications, Inc.	)
for approval of an asset transfer, acquisition of	)
control by merger and associated transactions	)

INITIAL BRIEF OF ONE COMMUNICATIONS CORP.

One Communications Corp. ("One Communications") hereby files this initial brief in opposition to the petition of Verizon New England Inc., d/b/a Verizon Vermont et al. ("Verizon") and FairPoint Communications, Inc. ("FairPoint") (collectively, the "Petitioners") for approval of the proposed transfer of control in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

The extensive record in this proceeding makes clear that the proposed transaction does not satisfy the public good standard of 30 V.S.A. § 107 or the no obstruction or impairment of competition standard of 30 V.S.A. § 311. The proposed merger poses a major threat to the provision of ILEC wholesale input services by the Verizon LEC in Vermont. The Merged Firm will be highly leveraged, and it has made an ever-growing list of costly promises to stakeholders in this transaction, including those to shareholders (to maintain the same dividend post-merger),

[1] *See* Joint Petition Of Verizon New England Inc., Certain Affiliates Thereof And FairPoint Communications, Inc. For Approval Of Asset Transfer, Acquisition Of Control By Merger And Associated Transactions, Pursuant To 30 V.S.A. §§ 107, 109, 231 and 311, Docket No. 7270 (filed Jan. 31, 2007) ("Petition").

organized labor (to provide jobs and pension and other benefits), and the state government and its citizens (to expand broadband availability statewide). Moreover, the Merged Firm will have little incentive to expend its limited resources on developing the systems and expertise necessary for the incumbent LEC subject to the proposed transfer to comply with its wholesale obligations under the 1996 Telecommunications Act even at the level achieved by Verizon. There is an intolerably high risk that FairPoint will fail in this undertaking. While its downstream retail operations would benefit from such failure, competition and Vermont consumers would suffer.

Thus, the proposed transaction threatens to turn the clock back to the time before Verizon met the competitive checklist requirements of Section 271 and other obligations under the 1996 Act necessary to open the local market to competition. FairPoint has virtually no experience in providing wholesale unbundled network elements (UNEs) or interconnection to competitors. Absent clear legal obligations to comply with the checklist and other market-opening obligations, and a strong set of behavior requirements designed to meet those obligations, the Merged Firm is unlikely to be able to develop new operating support systems (OSS) for the Merged Firm without seriously diminishing competitors' ability to obtain access to wholesale inputs.

In order to ensure that the proposed transaction does not impair or obstruct competition in the market for wholesale services in Vermont, the Board must require the Merged Firm to comply with the competitive checklist of Section 271 of the 1996 Act, just as the Board did in the order approving the Bell Atlantic-NYNEX merger. This condition will ensure that the Merged Firm is subject to the same market-opening requirements of the 1996 Act as Verizon. The Merged Firm must also be precluded from seeking the rural carrier protections of Section 251(f)(1) and (2) of the 1996 Act, thereby permitting it to escape its obligations to provide, for example, interconnection or UNEs, to requesting competitors. The Merged Firm must also comply with the following conditions: (1) independent third-party testing of the Merged Firm's wholesale OSS; (2) prohibition on the pass-through of any OSS and other merger-related costs to wholesale customers; (3) prohibition on the Merged Firm and Verizon's reneging on existing special access volume-term discounts (including the requirement that purchasers continue to receive the same discounts post-merger that they received pre-merger); (4) a freeze on the Merged Firm's special access and UNE prices for a reasonable period of time; and (5) the requirement that the Merged Firm extend all existing Verizon interconnection agreements and other wholesale arrangements.

II. PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE PROPOSED TRANSACTION WILL PROMOTE THE PUBLIC GOOD IN VERMONT.

The Petitioners have failed to show that the proposed merger satisfies the most important criteria of the public good standard under Section 107. FairPoint has neither the financial stability nor the technical knowledge to develop OSS for the provisioning of wholesale services nor management with the requisite experience to competently run a large Merged Firm with substantial wholesale operations. FairPoint brings its poor reputation for service and quality in Northern New England to the proposed merger. If this were not enough, FairPoint's commitments to various stakeholders will result in increased costs for the Merged Firm rather than cost savings that can be passed on to consumers in Vermont.

A. The Proposed Transaction May Only Be Approved if It Satisfies the Public Good Standard of Section 107.

The Board has the authority to review and approve the proposed merger pursuant to 30 V.S.A. § 107. Section 107 states as follows:

> No company shall directly or indirectly acquire a controlling interest in any company subject to the jurisdiction of the public service board, or in a company

> which, directly or indirectly has a controlling interest in such a company, without the approval of the public service board . . . .

In the proposed transaction, Verizon would transfer its assets, accounts receivable, liabilities, and customer relationships relating to its local exchange, intrastate toll, exchange access, and long-distance operations in Vermont, New Hampshire, and Maine to two companies subject to the Board's jurisdiction, "Telco" and "Newco." *See* Petition ¶¶ 5-7. FairPoint will then acquire a controlling interest in these two companies. *Id.* Thus, under Section 107, prior approval of the Public Service Board of the proposed merger is required for the proposed transaction.

It is well established that the Public Service Board shall only grant Section 107 approval where the proposed merger promotes the public good. *See, e.g.,* Verizon-MCI, Docket No. 7056, Order of 11/29/05 at 7 ("Verizon-MCI Order"); Bell Atlantic-GTE, Docket No. 6150, Order of 9/13/99 at 8 ("Bell Atlantic-GTE Order"); Bell Atlantic-NYNEX, Docket No. 5900, Order of 2/26/97 at 2 ("Bell Atlantic-NYNEX Order"). The Board has identified 15 criteria that inform the public good standard of Section 107:

1. The company must have authorization from the FCC to provide the proposed services.
2. Emergency services must be available.
3. The system must be compatible with neighboring systems.
4. Terms and conditions of service must be just and reasonable.
5. Service quality will be adequate.
6. Customer service, including the processing of customer complaints, will be adequate.
7. The quality of facilities must be adequate.
8. The rate of investment will be adequate to provide the contemplated services.
9. The company must be financially stable and sound.
10. The company must take satisfactory steps to control affiliate interests.
11. Management must be competent.

12. The company must have the technical knowledge, experience and ability to provide the intended services.

13. The owner must have a good business reputation.

14. The merger should produce efficiencies in providing service.

15. The merger should not obstruct or impair competition.

See Bell Atlantic-NYNEX Order at 9.

The Board has clarified that "[w]hile each of the fifteen items may be considered in reaching a decision, that decision, finally, consists of determining whether, based on the record, and balancing all of the factors, the public good standard is satisfied." Bell Atlantic-GTE Order at 48. Moreover, the Board does not consider all fifteen criteria to be of equal importance, but instead focuses primarily on the five criteria that pertain to the surviving entity (Criteria Nos. 9, 12, 13, 14, and 15). *See* Verizon-MCI Order at 7. Thus, the Board is most interested in: (1) "whether the new organization will be financially sound"; (2) "whether the new organization will be technically competent"; (3) "whether the new organization will act as a fair partner in business transactions with the citizens of Vermont," and relatedly, "whether the participants to the financial transaction have a good business reputation";[2] (4) whether the merger will produce "efficiencies that will benefit consumers"; and (5) "whether the transaction will obstruct or impair competition."[3] Bell Atlantic-GTE Order at 48-49. As discussed herein, Petitioners have failed to demonstrate that the proposed transaction satisfies any of these criteria.

---

[2] Notwithstanding the Board's holding in the Bell Atlantic-GTE Order, a subsequent Board decision focused solely on business reputation. *See* Verizon-MCI Order at 13.

[3] This criterion is the same as the statutory standard under 30 V.S.A. § 311 and is therefore addressed in the discussion of Section 311. *See* Part III *infra*.

B. The Acquiring Company Is Not Financially Sound.

The record makes clear that FairPoint is a highly leveraged public company that needs the proposed merger to satisfy the demands of its stockholders. Financial projections prepared for FairPoint's Board of Directors show that (1) FairPoint's total shareholders' equity will "go[] negative" in 2013, falling to a $218 million deficit in 2015;[4] (2) FairPoint is a company that will have "a worsening financial condition . . . with declining free cash flows and rising dividend payment and leverage ratios" between 2008 and 2015;[5] and (3) "[b]ased on *FairPoint's financial advisors' own analysis*, . . . FairPoint management and its Board of Directors believed they had little alternative to pursuing the Verizon Northern New England acquisition, whatever the risks." Barber r.t. at 34 (lns. 16-18) (emphasis added). After the proposed transaction, the Merged Firm will also be financially weak. Through the proposed merger, FairPoint will assume approximately $1.7 billion in new debt,[6] and it will have approximately $2.35 billion in outstanding debt at closing.[7]

Notwithstanding the immense debt it will assume, FairPoint has made numerous costly commitments to various stakeholders. For example, FairPoint has publicly promised its shareholders that the Merged Firm will maintain the same dividend post-merger. *See* Exhibit WL-3, at 5. As a result, "Standard & Poor's (S&P) assigned FairPoint a qualitative risk

---

[4] *See* Rebuttal Testimony of Randy Barber on Behalf of CWA and International Brotherhood of Electrical Workers ("IBEW"), at 30 (lns. 16-18) (Aug. 10, 2007) ("Barber r.t.").

[5] *Id.* at 33 (lns. 17-19).

[6] *See* Exhibit WL-3, at 4 ("Exhibit WL-3") to Prefiled Rebuttal Testimony of Walter E. Leach, Jr. on Behalf of FairPoint Communications, Inc. (June 27, 2007) "Leach p.f.r.") (FairPoint analyst presentation of Jan. 16, 2007).

[7] Direct Testimony of Stephen E. Smith on Behalf of Verizon New England Inc. et al., at 15 (lns. 18-19) (Mar. 23, 2007) ("Smith d.t.").

assessment of 'high' in its March 24, 2007 stock report."[8] As the Department of Public Service's (the "Department" or "DPS") witness, Mr. Wheaton, has recognized, there is a "significant risk[]" that FairPoint will be unable to fund its capital program and its operations because, according to S&P, the "'risk assessment reflects [both] a balance sheet that we view as relatively weak and the company's commitment to pay a large quarterly dividend out of what we consider its somewhat limited cash reserves, which we believe is partially offset by the rural nature of its operations.'" *Id.* (lns. 8-11). Mr. Wheaton has similarly observed that Morningstar has determined that it "'expect[s] FairPoint to begin paying full taxes in 2010, which may strain its ability to maintain dividend payments and make necessary expenditures.'" *Id.* (lns. 13-15) (internal citation omitted).

In addition, FairPoint has promised to (1) hire more than 700 new employees;[9] (2) assume all existing collective bargaining agreements with union employees;[10] and (3) assume the pension liability associated with active Verizon employees at closing. Smith d.t. at 18 (lns. 5-9). The Applicants have also publicly pledged that the Merged Firm will spend "$44 million . . . to increase broadband availability soon after closing to between 75-80% of the Northern New England company's customers." Leach p.f.r. at 4 (lns. 2-4). It is hard to imagine how the Merged Firm will be able to follow through on all of these promises simultaneously, let alone make good on any promises to wholesale customers. The truth is, FairPoint cannot do it all:

---

[8] Direct Testimony of Perry L. Wheaton on Behalf of the Department of Public Service, at 21 (lns. 6-8) (May 24, 2007) ("Wheaton d.t.").

[9] *See* Prefiled Rebuttal Testimony of Brian Lippold on Behalf of FairPoint Communications, Inc., at 10 (ln. 22) & 11 (ln. 1) (June 27, 2007) ("Lippold p.f.r.").

[10] *See* Exhibit WL-3, at 13.

> In my view, [the fact that FairPoint treats dividends as a fixed cash item] creates a powerful incentive to structure other cash impacting plans (such as capital expenditures) to fit around these pre-determined expenditures. For example . . . [t]he one-time $42 million that FairPoint intends to invest in upgraded DSL facilities in [Northern New England] represents less than one-third of a single year's worth of planned FairPoint dividends.

Barber r.t. at 21 (lns. 3-9).

C. The Acquiring Company Has Neither The Technical Knowledge, Nor The Experience, Nor The Ability To Provide Wholesale Services.

As mentioned, one of the five most significant criteria in determining whether a proposed merger will promote the public good is that the acquiring company must have the technical knowledge, experience, and ability to provide the intended services. *See* Part II.A *supra* (citing Bell Atlantic-NYNEX, Docket No. 5900, Order of 2/26/97 at 9). A related criterion is that the management of the acquiring company must be competent. *Id.* Here, existing management lacks the experience and ability to meet the wholesale obligations of the Merged Firm.

The Merged Firm will be significantly different from FairPoint today in at least two critical respects. *First*, the Merged Firm will grow exponentially in size. FairPoint's total access line equivalents will increase from approximately 300,000 to approximately two million. See Exhibit WL-3, at 15. As Department witness Mr. Lafferty has observed, "[w]hile FairPoint has undertaken many smaller acquisitions, it has not faced a transaction of this magnitude with the complex systems development and conversion challenges."[11] Indeed, FairPoint must take on numerous substantial and costly management tasks for the vastly larger Merged Firm after the proposed transaction is completed. For example, the Merged Firm is responsible for establishing "its own service solutions for environmental and safety management, risk management, investor

[11] Direct Testimony of F. Wayne Lafferty on Behalf of The Department of Public Service, at 4 (lns. 17-19) (May 24, 2007) ("Lafferty d.t.").

relations, benefit design, compensation planning, diversity compliance, labor relations, staffing, workforce and leadership development, and credit and collections." Smith d.t. at 26 (lns. 3-6).

There is simply no basis for concluding that existing FairPoint management has the expertise or ability to manage all facets of such a large company efficiently. The company is scrambling to "supplement" its "expertise with management experience from larger companies,"[12] but key positions remain unfilled. For example, FairPoint still has not identified the new Vice President of Operations and Engineering for the Merged Firm.[13] This is arguably one of the most important leadership positions in the Merged Firm given that, as discussed below, the Merged Firm will experience a substantial and costly overhaul of back office systems. In light of this "learning on the fly" approach, it is not surprising that the company has already conceded that it may not be able to maintain adequate service quality post-merger:

> To be honest I would say that we would expect that when we cutover new operational support systems there will be some temporary disruptions in service quality. A company I was with previously cutover a new billing system and during the two months following the cutover of the new billing system our answer time wasn't as good as it had been prior to that point.[14]

Second, the Merged Firm will become a significant provider of wholesale services in the Northern New England area, something that FairPoint is not and has never been. Of the 64,000 access lines that FairPoint now serves in Maine, New Hampshire, and Vermont, not a single one is sold to a wholesale purchaser.[15] FairPoint has also confirmed that, for all practical purposes, it

---

[12] Nixon p.f. at 14 (lns. 11-12).

[13] Prefiled Rebuttal Testimony of Peter G. Nixon, at 11 (lns. 7-8) and 17 (lines 16-17) (June 27, 2007) ("Nixon p.f.r.").

[14] Technical Hearing Held Before The Vermont Public Service Board, Transcript at 202 (lns. 11-17) (Sept. 7, 2007) (Mr. Skrivan) ("Skrivan Hearing Testimony").

[15] Exhibit One-3.

has no wholesale access lines in the other states in which it operates as an incumbent LEC. Exhibit One-4. As Dr. Pelcovits observes, "FairPoint has virtually no experience as a provider of wholesale telecommunications services, having only 12 interconnection agreements with competitors in its current markets."[16] FairPoint therefore has no wholesale systems or processes in place[17] and no experience in meeting the wholesale requirements of Sections 251, 271, or 272 of the 1996 Act or in providing wholesale special access services. Indeed, according to Dr. Pelcovits, FairPoint has not "established its technical proficiency to perform cutover activity required or that its systems replacing those of Verizon are likely to operate in an efficient and reliable manner." Pelcovits p.f. at 16 (lns. 8-10). FairPoint itself has conceded that it is exploring new territory. Among other things, it is acquiring a wholesale business it has not had before. "[T]here are aspects of this acquisition that obviously make this transition different from others we have done, namely the size of the transaction, the need to migrate from existing Verizon systems and the addition of a wholesale business serving CLECs and other wholesale customers."[18]

FairPoint's lack of experience as a wholesale provider creates a significant risk that wholesale service in Vermont will deteriorate post-merger. Under the TSA, Verizon will provide FairPoint "with major support services until such time as [FairPoint] develops its own

---

[16] Prefiled Testimony of Michael D. Pelcovits on Behalf of New England Cable & Telecommunications Association, Inc. and Comcast Phone of Vermont, LLC, at 7 (ln. 18) and 8 (ln. 1) (May 24, 2007) ("Pelcovits p.f.").

[17] FairPoint has stated that it "recently concluded thirty-one company conversions to a single operating environment. This included basic BSS/OSS functionality. *Wholesale services were not part of the service offering of the companies therefore there were no wholesale data to convert*." Exhibit One-13 (emphasis added).

[18] Prefiled Testimony of Michael Haga On Behalf Of FairPoint Communications, Inc., at 4 (lines 4-21) and 5 (lines 1-8) (Mar. 23, 2007) ("Haga p.f.").

support systems and groups to provide these services."[19] The Merged Firm will be required to pay millions of dollars in fees to Verizon each month to assist in performing wholesale functions. Those fees increase over time,[20] at a monthly rate of approximately 3.4 percent. Pelcovits p.f. at 50 (lns. 4-5). Therefore, the Merged Firm will have a strong incentive to discontinue reliance on Verizon as soon as possible:

> Although the motivation of this [fees] provision — to force FairPoint to wean itself from Verizon — is understandable, it could be deleterious to wholesale and retail customers if it caused FairPoint to rely on substandard replacement systems rather than Verizon's established systems, or forced FairPoint to move from Verizon's systems prematurely.

Id. (lns. 5-9). Similarly, another witness testified, "Clearly, even if FairPoint's systems aren't ready by the end of the first year, they will be under great financial pressure to cutover to their own systems to avoid the mounting payments to Verizon." Direct Testimony of Gary J. Ball on Behalf of Sovernet and Segtel, at 9 (lns. 20-22) (May 23, 2007) ("Ball d.t."). Indeed, premature discontinuance would be a "win-win" for the Merged Firm since it would experience lower costs and its competitors would experience degraded service, thus harming the competitors' reputations for service quality and enhancing the Merged Firm's competitive position.

This is not simply a theoretical problem; wholesale customers' experience in Hawaii after Verizon sold Hawaiian Telcom ("HawTel") to the Carlyle Group, a private equity firm, provides

---

[19] Smith d.t. at 23 (lines 6-7).

[20] *See* Exhibit VZ-SES-1; Exhibit VZ-SES-4 at Art. II, § 2.1(a)-(b) (providing that FairPoint will pay Verizon for so-called Schedule A services, including wholesale support services, at a fee of $14.2 million per month for the first eight months following closing; for each month beginning in the ninth month, $500,000 less than for the prior month until the 13th month; $14.7 million for the 13th month; and for each month following the 13th month until termination of the agreement, $500,000 more than the amount paid for the prior month"); Exhibit VZ-SES-4b at § VPS.SR.1 (delineating Verizon's obligations to FairPoint with respect to wholesale service requests during transition).

concrete evidence that spin-off transactions can result in serious wholesale service quality degradation. When it approved the merger, the Hawaii PUC imposed conditions to ensure that the risks of OSS changes would be minimized. Unfortunately, these measures, which did not include automatic financial penalties for HawTel's failure to meet the stipulation requirements, proved to be insufficient to prevent a major breakdown in HawTel's wholesale OSS after the consummation of the spin-off transaction. By all accounts, the highly leveraged company utterly failed in its systems integration efforts—including contingency planning—following consummation of the transaction. *See, e.g.,* Pelcovits p.f. at 19-21; *see also* Ball d.t. at 10 (lns. 15-21). This failure of wholesale services caused Time Warner Telecom to file a request (which is still pending) for an investigation and independent audit of the operational readiness of HawTel's back office systems in July 2006. *See* Pelcovits p.f. at 21 (lns. 14-17). Little appears to have changed since then. In its 2006 Form 10-K filed with the SEC on March 31, 2007, HawTel acknowledged that following the original cutover to HawTel's OSS, "critical systems related to back-office functions such as customer care, order management, billing, supply chain, and other systems inter-facing with our financial systems, lacked significant functionality." *See* Ball d.t. at 11 (lns. 4-7) (internal citation omitted). The company disclosed that this deficiency had "substantially impacted . . . customer satisfaction (as evidenced in part through a large increase in the customer call volume at our work centers)." *Id.* (lns. 22-23). Recognizing the enormous tasks still in front of it, HawTel cautioned in its Form 10-K that "there is no certainty" that its systems would achieve full functionality. *See* Pelcovits p.f. at 21 (lns. 4-5) & Exhibit NECTA/CPVT-MDP-12. The resulting financial and operational pressures on the company will doubtless cause it to focus wherever possible on fixing its retail service problems at the expense of the wholesale service problems that have harmed Time Warner Telecom and other CLECs.

The Petitioners provide no reason to think that the situation in Vermont will be any different than it has been in Hawaii. In their Petition, Verizon and FairPoint do not even attempt to show that the Merged Firm's wholesale operations will function properly. FairPoint instead claims that it is qualified to perform as a wholesaler because it operates two CLEC subsidiaries. *See* Haga p.f. at 3 (ln. 22) and 4 (lns. 1-2). This is like saying that a driver's license gives one the expertise to design, manufacture and sell cars. The unstated converse of FairPoint's claim is that it has no experience whatsoever provisioning UNEs or designing an OSS needed for wholesale operations, or otherwise performing the functions necessary to effectively serve multiple CLECs that rely on thousands of UNEs and resold loops today in the affected area.

In their testimony, Petitioners attempt to differentiate the experience of the Carlyle Group in its acquisition of Verizon's local exchanges in Hawaii on several grounds, none of which is convincing.[21] *First*, FairPoint asserts that the Carlyle Group lacked the requisite experience to manage HawTel. Smith r.t. at 11 (lns. 3-4). Assuming that this were true, which it is not, FairPoint has failed to demonstrate that it has any more experience in developing wholesale OSS than the Carlyle Group did when it acquired HawTel. To the contrary, FairPoint has *no* experience in operating a wholesale telecommunications business.

Second, the Petitioners assert that FairPoint will be using a different consulting firm, to assist in the creation and integration of back office systems than the firms retained by HawTel. *See id.* at 10 (lns. 20-21) and 11 (lns. 16-24). But there is no basis for concluding that the firm FairPoint has retained, CapGemini, will be any more successful here than BearingPoint or Accenture has been in Hawaii. *See id.* at 10 (lns. 18-21) & 11 (lns. 15-18). The Petitioners'

[21] *See, e.g.,* Rebuttal Testimony of Stephen E. Smith on Behalf of Verizon Vermont et al., at 10 (lns. 16-23), 11 (lns. 1-24), & 12 (lines 1-10) (June 27, 2007) ("Smith r.t.").

description of CapGemini's experience and expertise could equally apply to BearingPoint or any other consulting firm that provides systems integration and other solutions for merging telecommunications carriers. The Petitioners consistently cite their employment of CapGemini to divert attention from FairPoint's lack of experience in the provision of wholesale services. *See, e.g., id.* at 11 (lns. 16-24), 12 (lns. 21-23) & 13 (lns. 10-12). However, retaining a consulting firm to assist in systems integration is not a panacea for problems that will likely occur during integration. Whatever experience CapGemini has in telecom consulting, it does not make up for FairPoint's complete lack of experience in the provision of wholesale services to competing carriers.

Moreover, FairPoint lacks the experience even to *manage CapGemini's efforts* to create and integrate OSS. As Department witness Mr. Wheaton has concluded,

> FairPoint does not have a seasoned expert who has either managed or monitored a systems development and conversion effort of this magnitude and whose prime responsibility is to oversee and manage this relationship. This deficiency limits FairPoint's ability to manage this effort effectively.

Wheaton d.t. at 25 (lns. 10-13). DPS witness Mr. Mills elaborated:

> [T]he FairPoint leadership team responsible for management and oversight of the CapGemini contract and relationship does not appear to have prior experience managing an outsourced vendor effort of this cost and magnitude. The contract with CapGemini clearly defines what must be delivered, but FairPoint would be responsible for meeting the State of Vermont rate payers' requirements, and experienced oversight is required to ensure that CapGemini is on-track. Given the aggressive development and delivery schedule for this project, if FairPoint intends to bring in additional senior management experienced in managing consulting contracts of this magnitude, this would need to occur very soon or the project could be too far underway to provide influence.

Direct Testimony of W. Curtis Mills, Jr. on Behalf of the Vermont Department of Public Service, at 18 (lns. 5-14) (May 24, 2007).

It is clear, therefore, that FairPoint has neither the technical expertise nor the management experience to provide satisfactory wholesale services to Verizon's existing customers in Vermont, including One Communications.

D. The Acquiring Company Does Not Have A Good Business Reputation In That It Will Be Unable To Deliver High Quality Wholesale Service.

The Board held in the Bell Atlantic-GTE Order (at 48), that one of the five most important factors in determining whether a proposed merger will promote the public good is whether the acquiring company will act as a fair partner in business transactions with the citizens of Vermont and whether the acquiring firm has a good business reputation. While customer service and service quality are both Section 107 criteria independent of the business reputation and "fair partner" criterion, the former informs the latter. Here, the available evidence regarding FairPoint's level of service quality, as well as FairPoint's ability to act as a fair, reliable telecommunications carrier that will deliver on its promises, indicates that FairPoint does not have a good business reputation in Northern New England generally or in Vermont specifically.

DPS' Consumer Affairs and Public Information Specialist, Ms. Pariseau, who is responsible for resolving customer complaints and making recommendations to staff attorneys on service quality and consumer protection issues,[22] has determined that FairPoint has "not demonstrated a commitment to a high level of service quality." *Id.* at 5 (lns. 4-5). With respect to the conversion of billing and other back office systems from Verizon to FairPoint post-transaction, Ms. Pariseau has testified as follows:

> The Department is forced to rely on the historical perspective of two difficult billing conversions [in 2005 and 2006], each of which resulted in months of billing inaccuracies for Vermont consumers and a higher than average demand on

---

[22] *See* Prefiled Testimony of Tamera S. Pariseau on Behalf of the Vermont Department of Public Service, at 1 (lns. 22-27) (May 24, 2007) ("Pariseau p.f.").

> FairPoint's customer service staff, a demand FairPoint was not equipped with as witnessed by the excessively long wait times experienced by consumers attempting to contact FairPoint.

Id. at 9 (lns. 24-27) and 10 (lns. 1-2). Based on her review of five years of consumer complaint data (from 2002 to 2006), Ms. Pariseau concluded that Vermont "consumers are increasingly experiencing problems with FairPoint, specifically in the areas of billing, delivery of service, and repairs." *Id.* at 10 (ln. 27) and 11 (lns. 1-2).

It is also worth noting that FairPoint has made *no* binding promises to improve service quality. To the extent it has stated intentions in this area, they are non-binding and the Merged Firm is entirely free to change its mind. While FairPoint has stated that binding conditions on merger approval are not necessary in light of its promises, FairPoint should not be averse to accepting such conditions if it intends to follow through on those promises anyway.

Moreover, in further determining whether FairPoint can act as a fair partner in business transactions with citizens in Vermont, the experience of citizens in Maine is particularly instructive because FairPoint is the second-largest ILEC in Maine (post-merger, it will become the largest ILEC in Vermont). *See* Lafferty d.t. at 26 (lns. 11-13). In Maine, the number of reported customer complaints in 2005 and 2006 were more than twice the number in 2004. *Id.* at 25 (lns. 22-23) and 26 (ln. 1). According to DPS witness Mr. Lafferty, "the Consumer Assistance Division of the Maine PUC claims that FairPoint's level of complaints is above the level for other carriers." *Id.* at 26 (lns. 2-3). Moreover, according to Mr. Lafferty, "at least some of the service concerns in Maine stem from problems with the conversion of a customer care and billing system." *Id.* (lns. 16-17).

FairPoint's lack of commitment to service quality affects the citizens of Vermont both directly, and indirectly in its role as wholesale provider. As discussed further below, FairPoint has no experience providing services to wholesale customers, and therefore the Board will be unable to conclude that FairPoint acts as a fair business partner in this regard.

E. The Proposed Transaction Will Not Produce Efficiencies That Benefit Customers.

Under the Board's Section 107 standard, the proposed merger must create efficiencies that benefit customers. In the Verizon-MCI Order, the Board found that the transaction would produce efficiencies in the enterprise market by, among other ways, permitting large business customers to purchase more services in single transactions (at 13-14). In the Bell Atlantic-GTE Order, the Board adopted the Hearing Officer's finding that the merged firm would reduce overall expenses through "efficiencies such as greater purchasing power, eliminating duplicative systems, and reducing corporate overhead." Bell Atlantic-GTE Order ¶ 20. The Hearing Officer made this finding based on a number of factors, including the fact that the merged firm would realize gross annual savings of $2 billion in operating expenses and $500 million in capital expenditures. *See id.* ¶¶ 22-24.

Here, by contrast, the Petitioners cannot demonstrate that their merger will generate efficiencies that will benefit Vermont consumers in the form of, for example, lower rates. Unlike in the case of Verizon and MCI, Petitioners' businesses are not complementary. Nor, as in the Bell Atlantic-GTE transaction, will the proposed merger eliminate duplicative operations or systems. To the contrary, the Merged Firm intends to maintain two separate sets of operating entities in Vermont. Indeed, as Petitioners have stated, "[n]one of the local exchanges being acquired by FairPoint from Verizon overlap with any of the local exchanges already served by FairPoint Vermont, Inc., which will remain separate from Telco and Newco and have its own tariffs." Petition ¶ 17.

The record is replete with evidence of significantly increased operating expenses and capital expenditures rather than cost savings. To begin with, the Merged Firm will hire at least 600 new employees and create three new local customer service centers in Northern New England. *Id.* ¶ 26. The most significant purported benefits of the proposed merger—"increased investment in existing network infrastructure and services," "improved availability, job creation, and investment in new local service support centers"—will require more, not fewer expenditures. Leach p.f. at 11 (lns. 21-23) and 12 (ln. 1). Even after one-time costs have been incurred, it is difficult to imagine how these expenditures will be offset by increased efficiencies in other parts of the business. As FairPoint admits, "other than the identified efficiencies resulting from the replacement of certain Verizon allocated functions and their associated costs, FairPoint has not assumed any cost-cutting measures and, in fact, has assumed some rising operating costs." Leach p.f. at 34 (ln. 23) and 35 (ln. 1-3).

It is therefore entirely possible that, rather than resulting in efficiencies that can be passed on to the public in the form of reduced rates, the one-time and recurring costs incurred by the Merged Firm will cause rates for Vermont's retail residential and business customers and its wholesale customers to increase. As Wall Street has recognized, FairPoint's claims that the proposed transaction will create meaningful efficiencies are dubious:

> Morningstar, in its report dated March 9, 2007, states "we are skeptical of management's claim that it can eke out annual cost savings of $60-75 million following the integration, equaling a 7%-8% reduction in operating expenses. Remarkably, FairPoint is not planning any job reductions, as are typical in deals of this nature. In fact, the combined company plans to grow its employee head count by 20% to accommodate bringing previously outsourced work in-house."

Wheaton d.t. at 27 (lns. 6-11).

Finally, as DPS Telecommunications Director Chris Campbell aptly noted, even if the merger does produce some efficiencies, "then the question is how will Vermont benefit?"[23] Mr. Campbell's assessment is that efficiencies producing reduced expenses will not lead to lower rates, "except perhaps by Board order." Campbell p.f.r. at 31 (lns. 5-8). To the contrary, the evidence shows that the proposed merger will be a detriment to Vermont consumers, because (perhaps among other reasons) telecommunications competition will suffer.

III. ABSENT CONDITIONS, THE PROPOSED TRANSACTION WILL IMPAIR AND OBSTRUCT COMPETITION IN THE WHOLESALE SERVICES MARKET IN VERMONT.

FairPoint's financial instability, lack of technical expertise, inexperienced management, reputation for poor service, and promises to various stakeholders, including employees and shareholders, all create the substantial risk that the proposed merger will impair or obstruct competition. Accordingly, the Board should not approve the proposed transaction unless it imposes the conditions proposed by One Communications.

A. The Proposed Transaction Can Only Be Approved If It Does Not Impair or Obstruct Competition Under Section 311.

The last of the five most important criteria under the Section 107 public good standard is the same as the legal standard under 30 V.S.A. § 311: the Board may approve a merger only upon a finding that the merger

> will not result in obstructing or preventing competition in the purchase or sale of any product, service or commodity, in the sale, purchase or manufacture of which such corporations are engaged.

30 V.S.A. § 311. As stated in the Verizon-MCI Order, the Board's application of Section 311 is informed by whether the proposed transaction affects a competitive market. Verizon-MCI Order

---

[23] Prefiled Surrebuttal Testimony of Christopher J. Campbell on Behalf of the Vermont Department of Public Service, at 30 (ln. 20) (August 10, 2007) ("Campbell p.f.s.").

at 15. Moreover, while mergers involving non-dominant companies or mergers where post-transaction there remain "a large number of competitors, barriers to entry are not high, and no competitor acquires substantial market power as a result of the merger," (*id.*; *see also* Bell Atlantic-NYNEX at 22) are generally approved, none of these circumstances is present.

First, CLECs have only a 12 percent share of end-user switched access lines in the state, compared to a nationwide average of 17 percent.[24] The Merged Firm will also control the only end-user connection to the overwhelming majority of business customers in the state. For example, as of June 2006, competitors with their own loop facilities served only 3.53 percent of total switched access lines in Vermont. *See id.* at Tables 7 & 11. There will be virtually no competitors to the Merged Firm in the critical product market in telecommunications today: the deployment of last mile loop facilities to end user customers. The combination of retail market share and control over upstream transmission inputs means that the Merged Firm is unquestionably dominant in the provision of local transmission services demanded by residential as well as small and medium business customers.

Second, barriers to entry are high, particularly in connection with deployment of local loop and transport facilities. *See, e.g., In re Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd. 2533, ¶ 150 (2005) (*"Triennial Review Remand Order"* or "*TRRO*") ("Competitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial operational barriers in constructing their own facilities.").

Third, by acquiring the local exchanges of Verizon, a dominant carrier, FairPoint will retain Verizon's market power and bottleneck control over essential facilities.

---

[24] Moreover, only four states have a lower CLEC share of end-user switched access lines than Vermont. *See* Exhibit NECTA/CPVT-MDP-3 at Table 8.

Through its newly dominant position in the local exchange market in Vermont, FairPoint will gain the incentive and ability to discriminate against competitors. Indeed, the FCC has held that incumbent LECs have a powerful incentive to deny, delay, and degrade wholesale services offered to their competitors.[25] As explained *infra*, the Merged Firm will likely act on this incentive by allocating its limited resources—including its constrained cash reserves, inexperienced management, and reputation for poor service—to fixing problems with its retail service while allowing wholesale service to deteriorate. As a result, the Board is obligated under the no impairment/no obstruction standard of Section 311 to impose certain conditions, as suggested herein, on the Merged Firm.

B. The Board Must Treat The Merged Firm As A BOC in Vermont, Subject To The Competitive Checklist Of Section 271 And Other Market-Opening Requirements Of The 1996 Act.

In order to ensure that Vermont's local telephone markets remain open to competition, the Board must condition the merger approval upon the Merged Firm's treatment as a Bell Operating Company ("BOC") in Vermont to ensure that the Merged Firm complies with all of the market-opening requirements of the 1996 Act applicable to BOCs, namely Sections 251, 271, and 272.[26] Only then will the very real possibility that the Merged Firm will refuse to comply with the bedrock legal requirements of Section 251 and 271 and the nondiscrimination requirements of Section 272(e) of the 1996 Act (which have not sunset) be eliminated. These conditions are justifiable on both legal and policy grounds.

---

[25] *See In re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control et al.*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, ¶¶ 214, 253 (1999), subsequent history omitted.

[26] 47 U.S.C. §§ 251, 271-72.

As a condition of its approval of Bell Atlantic's merger with NYNEX, the Board required NYNEX's Vermont operating subsidiary, the New England Telephone and Telegraph Company ("NET") to comply with the competitive checklist of Section 271(c):

> We agree with the Department that, as a condition of our approval, NET should be required to comply with the competitive checklist . . . . *To the extent that the merger will have any negative impact on competition, NYNEX's opening of its services to competitive entry, as measured by the competitive checklist, will redress those effects and ensure robust competition.*

Bell Atlantic-NYNEX Order at 35 (emphasis added). In that case, the Board determined that the public interest was satisfied by such a condition in connection with a merger involving the very same LEC operations under review here. For the same reasons, the Board should also require the Merged Firm to comply with the market-opening provisions of Sections 271 and 272 of the Act as Verizon does today.

Further, although FairPoint has stated that it "is not a Bell Operating Company (BOC) and will not be a BOC after closing,"[27] the plain language of the 1996 Act states otherwise. Under Section 3(4)(A) of the Act, the term BOC "means any of the following companies" including "New England Telephone and Telegraph Company."[28] New England Telephone and Telegraph is known today as Verizon New England Inc., Petitioner in the instant proceeding.[29] Thus, Verizon New England is a BOC.

---

[27] Nixon p.f.r. at 7 (lns. 4-6).

[28] 47 U.S.C. § 153(4)(A).

[29] Verizon New England is a wholly-owned subsidiary of NYNEX Corporation, which is in turn a wholly owned subsidiary of Verizon Communications Inc. *See* Petition ¶ 1; *see also* Smith d.t. at 6 (lns. 10-12) ("[Verizon New England (VNE)] will distribute the stock of Telco to VNE's parent, NYNEX Corporation" and "NYNEX will distribute the stock of Telco to its parent, Verizon").

Also, if that BOC transfers any LEC facilities, including those in Vermont, New Hampshire, and Maine, to FairPoint, the transferred LEC facilities must continue to be classified as BOC facilities. Section 3(4)(B) of the Act explicitly states that "any successor or assign" of a BOC listed in Section 3(4)(A), including New England Telephone and Telegraph Company, which provides "wireline telephone exchange service," is a BOC.[30] Under the relevant common law test applied by the FCC, FairPoint should be considered a "successor or assign" of Verizon if there is "substantial continuity" between Fair Point and Verizon in the relevant geographic and product markets.[31] Such continuity exists here.

Although FairPoint has stated its intention to comply with Verizon's obligation to provide wholesale inputs to local competitors, including compliance with the competitive

---

[30] 47 U.S.C. § 153(4)(B); *see also In re Sacred Wind Communications, Inc. and Qwest Corp. et al.,* Order, 21 FCC Rcd. 9227 (2006) (Chief, Wireline Competition Bureau) ("*Sacred Wind Order*"). When the FCC's Wireline Competition Bureau approved Qwest's sale of rural exchanges in New Mexico to Sacred Wind Communications, it rejected Sacred Wind's argument that because Sacred Wind was "merely acquiring 2,300 copper lines from Qwest, it [wa]s not acquiring an 'exchange' *per se*." *Sacred Wind Order* ¶ 20. The Bureau held that Sacred Wind was in fact acquiring exchange assets, facilities, and customers from Qwest in order to provide "telephone exchange service" and therefore, "Sacred Wind, as a successor to Qwest, meets the definition of an incumbent LEC pursuant to Section 251(h)(1) of the Act." *Id.* ¶ 25. The Bureau did not specifically address whether the successor entity can be classified as a BOC as opposed to merely an ILEC. However, the logical inference from the Bureau's analysis is that, as a successor to Qwest, an ILEC which is also a BOC, Sacred Wind meets the statutory definition of a BOC. Likewise, with respect to the instant transaction, the Merged Firm will acquire facilities from—and thus become a successor to—Verizon New England, an ILEC which is also a BOC. Accordingly, the Merged Firm will satisfy the statutory definition of a BOC under Section 3(4)(B) and be subject to all provisions of the Act applicable to BOCs.

[31] *See e.g., Howard Johnson Co,* 417 U.S. 249, 261 (1973) (holding that "continuity of identity in the business enterprise necessarily includes, we think, a substantial continuity in the identity of the workforce across change in ownership"); *Fall River Dying v. NLRB*, 482 U.S. 27, 43 (1987) (holding that in determining whether substantial continuity exists, courts will look to "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.").

checklist of Section 271(c),[32] such a non-binding promise is inadequate. Congress established the legal requirements applicable to BOCs because mere voluntary commitments would have been insufficient to compel them to open local markets to competition. In fact, Congress placed special obligations on BOCs on a state-by-state basis, to remain in compliance with the competitive checklist of Section 271(c) and with Section 272 *because even the extensive legal requirements applicable to incumbent LECs under Section 251(c)* were insufficient to ensure BOCs' continued cooperation in the provision of inputs to CLECs.[33] This is of course sensible in light of a BOC's powerful incentives to deny access to needed inputs throughout each state in which it operates.[34] Thus, accepting FairPoint's non-binding "promise" would leave the door open for the Merged Firm to change its mind about providing wholesale inputs to competitors and effectively gut the BOC-specific provisions of the Act. As DPS witness Mr. Lafferty testified,

> As a BOC Verizon is required to follow several of these provisions today and FairPoint should do the same to allow competitors and consumers in Vermont to continue to enjoy the same level of service and provide regulators the same level of oversight as with Verizon. In testimony FairPoint has said it will meet all of the regulatory obligations which apply to Verizon in Vermont; the Section 271 Checklist is one of those obligations. Therefore, since FairPoint is not listed as a

---

[32] Nixon p.f.r. at 7 (lns. 1-4) (FairPoint "will assume all of Verizon's wholesale contracts as of the closing," and it "agrees to provide anything that Verizon would be required to provide under the 14-point 'competitive checklist' set forth in section 271(c)(2)(B) of the federal Communications Act").

[33] This problem is more acute because of FairPoint's failure to commit not to seek relief from § 251 obligations by claiming it is a rural carrier under § 251(f). *See* Part III.C *infra.*

[34] *See generally Application by Verizon New England Inc. et al., for Authorizations to Provide In-Region, InterLATA Services in Vermont*, Memorandum Opinion and Order, 17 FCC Rcd. 7625 (2002).

> BOC in the 1996 Act, the Board must take action to ensure FairPoint continues to meet the commitments made by Verizon.[35]

One way to satisfy the Department's concern would be to subject the Merged Firm to the same condition that NET was required to satisfy by the Bell Atlantic-NYNEX Merger Order — compliance with the § 271 checklist.

C. The Merged Firm Must Be Prohibited From Seeking The Rural Exemption And Other Protections Of Section 251(f) Of The 1996 Act.

The proposed merger poses the risk that the Merged Firm will attempt to argue in the future that its LEC assets are eligible for the protections in Section 251(f)(1) or 251(f)(2) of the 1996 Act. Even the possibility that the Merged Firm could claim eligibility for these rural protections will have chilling effect on competition. Accordingly, the Board must condition approval of the proposed merger on prohibiting the Merged Firm from seeking the protections of Section 251(f)(1) or (f)(2).

Section 251(f)(1) states that Section 251(c) "shall not apply to a rural telephone company" until the following conditions are met:

> (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with [the universal service requirements of] [S]ection 254.

47 U.S.C. § 251(f)(1)(A). Thus, if a state commission decides that a rural incumbent LEC's fulfillment of a CLEC's request for UNEs, for example, would result in financial hardship or is technically infeasible, that "rural telephone company" would be exempt from fulfilling the request. If the Merged Firm qualifies as a "rural telephone company," an open question since the

[35] Surrebuttal Testimony of F. Wayne Lafferty on Behalf of the Department of Public Service, at 9 (lns. 2-9) (August 10, 2007) ("Lafferty s.t.") (emphasis added).

Applicants have failed to provide the information needed to make this assessment, it could attempt to argue that, in areas where it has not yet received a request for interconnection, services or network elements, it should be free of the requirements of Section 251(c).[36]

Section 251(f)(2) differs in several important respects from Section 251(f)(1). While Section 251(f)(1), "applies only to *rural* LECs and offers an *exemption* only from the requirements of Section 251*(c)*,"[37] Section 251(f)(2) establishes a procedure for all incumbent LECs "with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide" to request *suspension or modification* of the requirements of *either* Sections 251(b) *or* 251(c).[38] Under Section 251(f)(2), a state commission must grant the suspension or modification petition of any incumbent LEC with less than 2 percent of subscriber lines nationwide where suspension or modification is (A) needed to avoid (i) "adverse economic impact on users of telecommunications services generally," (ii) undue economic burden; or (iii) technical infeasibility; and (B) is consistent with the public interest.[39] The Merged Firm will

---

[36] Section 3(37) of the Act defines "rural telephone company" as a LEC that (A) provides common carrier service to any study area that does not include (i) any incorporated areas with at least 10,000 residents, based on the most recent population statistics or Census; or (ii) any "urbanized area" as defined by the 1993 Census; (B) provides telephone exchange service, including exchange access, to less than 50,000 access lines; (C) provides telephone exchange service to any study area with less than 100,000 access lines; or (D) has less than 15 percent of its access lines in communities with at least 50,000 residents on the date of enactment of the 1996 Act. 47 U.S.C. § 153(37). A "study area" corresponds to an ILEC's entire service territory within a state. "Thus, an incumbent LEC operating in more than one state typically has one study area for each state." *In re Sioux Valley Tel. Co. and Hills Tel. Co., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix Glossary of the Commission's Rules et al.*, Order, 20 FCC Rcd. 8071, ¶ 2 (2005).

[37] *In re Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd. 7236, ¶ 117 (1997), *subsequent history omitted* (emphasis added).

[38] 47 U.S.C. § 251(f)(2).

[39] *Id.*

own far less than 2 percent of the nation's approximately 175 million switched access lines nationwide.[40] Thus, even if the Merged Firm does not qualify as a rural telephone company for purposes of Section 251(f)(1), it would nevertheless have a basis for trying to argue in the future that it is eligible, under Section 251(f)(2), for a suspension or modification of any of the resale, number portability, dialing parity, rights-of-way, and reciprocal compensation requirements of Section 251(b) in addition to the interconnection, unbundling, collocation and other requirements of Section 251(c).

The Board must clarify that the Merged Firm would be legally precluded from exploiting the provisions of either Section 251(f)(1) or 251(f)(2). Permitting the Merged Firm to become eligible for Section 251(f) protections would be flatly inconsistent with the requirement that a "successor or assign" of a BOC continue to be classified as a BOC. The most important statutory requirement uniquely applicable to a BOC is that it comply with the competitive checklist of Section 271, and the Section 251(b) and (c) obligations listed therein, as a precondition for entering the in-region long distance market and retaining its authorization to provide such service on a going-forward basis.[41] If transferring BOC local exchange networks to another firm could free the BOC incumbent LECs from the core market-opening provisions of Sections 251 and 271, the incumbent LECs would cease functioning as BOCs in the process. The "successor or assign" provision of Section 3(4)(B) would thereby be rendered meaningless.

Moreover, while FairPoint has promised that the Merged Firm will not seek the rural exemption in Section 251(f)(1), such a non-binding commitment is worthless. Indeed, the

---

[40] *See* Exhibit WL-3, at 15 (estimating that FairPoint will have 2,022,109 access line equivalents post-merger).

[41] *See* 47 U.S.C. § 271; *see also supra* Part III.B.

Petitioners have never conceded that the Merged Firm does not qualify for the protection of Section 251(f)(1) and FairPoint's mere promises that it will not seek the exemption in no way constitute a formal waiver of the Merged Firm's right to do so in the future. Furthermore, at a hearing in this proceeding, FairPoint witness Mr. Skrivan explicitly testified that the Merged Firm may seek to invoke the suspension or modification provision of Section 251(f)(2) at some point in the future:

> FairPoint after the acquisition would . . . qualify as a two percent carrier. . . . And so what we're saying is at this point we honestly don't have anything in mind for that, but being [a] careful experienced regulatory person I would like to reserve that right so that if something came up, we could use [Section 251(f)(2)].[42]

Accordingly, the Merged Firm could seek suspension of, for example, Section 251(c) interconnection obligations. If that were the case, Dr. Pelcovits has testified that the Board could be forced to conduct costly and protracted proceedings in which CLECs would try to maintain their existing interconnection rights and the "costs and uncertainty of such potential litigation alone might well lead to a contraction of competitive presence in Vermont." Pelcovits p.f. at 28 (lns. 9-15). The Board must condition the proposed merger to ensure that competition in Vermont is not impaired in this manner.

If the Merged Firm is not precluded from seeking § 251(f) exemptions, competition in Vermont, and with it, Vermont consumers, will suffer. For over ten years the Board and Department have sought to promote telecommunications competition by the application of § 251 and the other provisions of the 1996 Act. *See, e.g.,* various orders in Dkt. No. 5713. Allowing the Merged Firm to escape its obligations under § 251 would remove a fundamental building block of the Board's and Department's efforts. The mere fact of this transaction should not undo

---

[42] Skrivan Hearing Testimony at 200 (ln. 25) and 201 (lns. 1-2 & 13-19).

years of effort by the Board and Department in promoting the good of the state through telecommunications competition.

D. The Board Must Impose Conditions To Ensure That Creation Of The Merged Firm's Operating Support Systems Does Not Harm Consumers Or Obstruct Competition In The Market For Wholesale Services In Vermont.

There is a substantial risk that the Merged Firm will fail to meet its most basic obligations under Section 251(b) and (c) as well as Sections 271 and 272. As explained, the Merged Firm must acquire the capability to support extensive wholesale operations, including building its own wholesale OSS and developing its own employee expertise in meeting ILEC wholesale obligations. The Merged Firm will have powerful incentives to divert resources away from wholesale obligations and toward meeting its commitments to shareholders, unions, and end-users.

The Petitioners argue that the Merged Firm will spend more per line than Verizon did, but this leaves even less money for wholesale functionalities. The Petitioners state that they have an incentive to keep the TSA between them in place because it is necessary to ensure retail service quality. But of course retail issues could well be addressed first, leaving wholesale issues unaddressed. In fact, given that FairPoint has much more experience in providing retail than wholesale service, there is good reason to expect that it will resolve retail issues more readily and quickly than wholesale issues. Once it has accomplished this, the Merged Firm would have a powerful incentive to discontinue the TSA in light of the TSA's fee structure. *See* Part II.C *supra*. As discussed the result may be similar to, or worse than, that experienced by the customers of Hawaiian Telcom after its post-merger wholesale OSS breakdown. To ensure that wholesale customers in Vermont do not suffer a similar fate, the Board must attach the following conditions to approval of the proposed merger. These and similar conditions have been proposed by several witnesses in this proceeding.[43]

1. Independent Third-Party Testing of the Merged Firm's OSS.

a. The Merged Firm must retain an independent third party with expertise in ILEC wholesale OSS operations and must design and follow a plan for the third party expert's review of all aspects of ordering, provisioning, maintenance and repair for UNEs, special access facilities, and interconnection in the region served by the transferred ILECs;

b. The Merged Firm's selection of the independent third party and the plan for wholesale OSS testing must be subject to review and comment by interested parties and Board approval;

c. The Merged Firm must be prohibited from converting wholesale operations from Verizon's OSS to the Merged Firm's OSS until the independent third party has determined that:

(i) The Merged Firm's wholesale OSS operate at a level of service quality at least equal to Verizon's prior to the transaction; and

(ii) The Merged Firm has established the processes and procedures for, and dedicated sufficient resources to, its wholesale OSS operations to ensure that its OSS will continue to operate at a level of service quality at least equal to Verizon's prior to the transaction. The independent third party tester's conclusions should be subject to notice and comment and approval by the Board prior to any cutover to the Merged Firm's wholesale OSS; and

d. The Merged Firm must also be prohibited from having a "black out" period in which wholesale OSS do not function during the cutover from Verizon's systems to the Merged Firm's

---

[43] *See, e.g.,* Exhibit DPS-CJC-5, at 3 (listing systems conversion conditions sponsored by DPS witness Mr. Mills); *see also* Exhibit NECTA/CPVT-MDP-1, at 2 (outlining OSS-related conditions proposed by Dr. Pelcovits).

systems. In addition, Section 271 performance assurance plans ("PAPs") must apply during this transition period.

2. Prohibition On Passing Through Costs Of The New OSS To Wholesale Customers.

The Merged Firm should be prohibited from forcing wholesale customers to incur extra expenses as a result of (a) the inefficiencies created by the proposed transfer or (b) its adoption of new wholesale OSS. For example, the Merged Firm should not be permitted to charge wholesale customers for training their employees in its new OSS; wholesale customers should not be required to develop their own OSS interfaces or other OSS features in order to continue to operate as they have prior to the proposed transaction; and the Merged Firm should be prohibited from seeking to recover any of the costs associated with its adoption of new wholesale OSS in wholesale rates of any kind. As Dr. Pelcovits has testified, "[i]t would not be reasonable to require the competitors to bear these costs, as they are directly related to this merger." Pelcovits p.f. at 52 (lns. 12-14). The Board can accomplish this objective by both a direct prohibition on pass-through of these costs and by a freeze on wholesale rates for an appropriate period of time (*e.g.,* four years).

E. The Merged Firm And Verizon Must Be Prohibited From Reneging On Special Access Discounts And The Merged Firm Must Extend All Inter-carrier Agreements.

The proposed transaction threatens to deprive competitors of the benefits of their existing special access volume-term service arrangements. The sale of the Verizon incumbent LEC facilities covering three states, including Vermont, will substantially reduce the volume of special access that companies like One Communications purchase from Verizon. This will give the Merged Firm the opportunity to assert that, after the transaction, One Communications no longer purchases sufficient volumes of special access to qualify for the price discount (and must therefore pay higher prices going forward) and other terms and conditions available under One

Communications' current volume-term plan. Verizon might also assert that, after the transaction, One Communications must pay higher special access rates and no longer benefit from other terms and conditions that apply today under the Verizon special access volume-term plan in the states where Verizon continues to own incumbent LEC assets. The Merged Firm and Verizon could seek to make these arguments, even though One Communications continues to purchase *exactly the same volume of special access from Verizon and Merged Firm together that it purchased from Verizon prior to the transaction*.

To prevent the proposed transaction from impairing competition in this manner, the Board must freeze the Merged Firm's special access, UNE, and other wholesale agreement prices for a reasonable period of time (*e.g.,* four years). Neither the Merged Firm *nor Verizon* be permitted to charge higher special access rates to purchasers under volume-term arrangements because they no longer meet the minimum volume required for a particular discount. Thus, the Merged Firm *and Verizon* should continue to honor all provisions of existing special access tariffs *except* to the extent that they could exploit diminished economies of scale or scope caused by the transaction. Under this exception, the Board would require that, after the transaction, the Merged Firm and Verizon offer the same special access discounts as those offered by Verizon today but conditioned on proportionate volume levels for the three states and for the remaining Verizon service areas. For example, if a CLEC has been obtaining a ten percent discount under a special access volume commitment plan from Verizon, it should continue to receive the same discount (1) from the Merged Firm on the condition that the CLEC meets a volume commitment that is appropriately adjusted to reflect the reduction in the size of relevant geographic territory to include only Maine, New Hampshire, and Vermont; and (2) from Verizon on the condition that the CLEC meets a volume commitment that is appropriately adjusted to reflect the reduction in the size of relevant geographic territory to exclude Maine, New Hampshire, and Vermont. In this manner, the Board can diminish the harm to competition posed by the transfer of the Verizon incumbent LECs to the Merged Firm.

The Board must also preclude the Merged Firm from exploiting any opportunities created by the proposed transaction to raise rivals' costs under existing interconnection agreements, special access wholesale arrangements, or other inter-carrier agreements. For example, there is no basis for enforcing any provision allowing the Merged Firm to cancel or renegotiate an interconnection agreement because of a transfer of the incumbent LECs to the Merged Firm.

Given that FairPoint witness Mr. Lippold has testified that the Merged Firm will agree to at least some of the aforementioned special access arrangement and inter-carrier agreement proposals by the Department and other parties to this proceeding,[44] FairPoint should have no objection to Board-imposed conditions to the same effect.

---

[44] *See* Lippold p.f.r. at 22 (lns. 15-20), 23 (lns. 1-15), 24 (lns. 1-10), and 25 (lns. 7-19).

IV. CONCLUSION

For the foregoing reasons, One Communications Corp. urges the Board to deny the instant Petition, or alternatively, to impose conditions on its approval that are consistent with the arguments made herein.

Respectfully submitted,

Paula W. Foley
ONE COMMUNICATIONS CORP.
24 Albion Road, Suite 230
Lincoln, Rhode Island 02865
(401) 834-3370

Of Counsel:
Thomas Jones
Nirali Patel
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, DC 20006
(202) 303-1000

October 17, 2007